

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-SIX**

OVERNITE TRANSPORTATION COMPANY

Employer

and

JAMES A. DUKE

Case 26-RD-1076

Petitioner

and

TEAMSTERS, LOCAL 667

Union

DECISION AND DIRECTION OF ELECTION

The Employer, Overnite Transportation Company, is engaged in the transportation of freight in interstate commerce and operates a terminal in Tupelo, Mississippi. On May 29, 1998, the Union, Teamsters Local 667, was certified as the bargaining representative of the full-time and regular part-time over-the-road truck drivers, city truck drivers, and dock workers employed by the Employer at the Tupelo facility.

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act seeking to decertify the Union as the bargaining representative. Following a hearing before a hearing officer of the National Labor Relations Board, the Employer and the Union filed briefs with me.

Two issues were raised at hearing and addressed in the parties' briefs: (1) whether the petition should be held in abeyance or "blocked" because of unfair labor practice cases involving the Employer's Memphis, Tennessee terminal; and (2) whether two part-time employees should be included in the unit. The Union

seeks to have the petition blocked because the contact between the Tupelo employees and the Memphis employees means that unfair labor practices by the Employer at its Memphis facility will preclude holding a free election among the Tupelo employees. The Employer and the Petitioner disagreed and contended that the petition should be processed and an election held. Regarding the part-time employees, the Employer and the Petitioner agreed they should be included in the unit, while the Union declined to take a position on their inclusion.

I have considered the evidence adduced during the hearing and the briefs filed by the Employer and the Union. As discussed below, I have decided that the petition should not be blocked because the unfair labor practices involved a different bargaining unit, are remote in time, and the showing of interest is recent. I have decided to include the part-time employees because they work regular schedules, share a community of interest with the other unit employees, and were covered by the 1998 certification.

Blocking the Petition

The Union relies upon **NLRB Casehandling Manual (Part 2) Representation Proceedings**, Sec. 11730, for the proposition that “pending [Representation] cases are held in abeyance when an unfair labor practice charge is unresolved and unremedied.” Section 11731.2 of the manual provides that there may be circumstances where the Regional Director is of the opinion that the employees could exercise their free choice and the election should proceed notwithstanding the existence of unfair labor practice cases. The factors to be considered in reaching that conclusion include: (a) the character, scope and timing

of the conduct alleged in the charge and the conduct's tendency to impair the employees' free choice; (b) the size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge; (c) whether the employees were bystanders to or the actual targets of the conduct alleged in the charge; (d) the entitlement and interest of the employees in an expeditious expression of their preference regarding representation; (e) the relationship of the charging parties to labor organizations involved in the representation case; (f) the showing of interest, if any, presented in the R case by the charging party; and (g) the timing of the charge.

At hearing, the Union made an offer of proof¹ concerning its contention that further processing of the petition should be blocked because of the Employer's unremedied unfair labor practices at the Memphis terminal.² That offer included the unfair labor practices described in a Board decision, unfair labor practices described in a decision of an administrative law judge, and correspondence showing that the Tupelo employees make runs to the Memphis facility and work on the dock at Memphis.

The Board's decision in **Overnite Transportation Company**, 335 NLRB No. 33 (2001) involved unfair labor practices at the Memphis facility which occurred in 1997. Those unfair labor practices included the discharge of three

¹ I find no error in the Hearing Officer's refusal to allow the offer of proof to be made through testimony. The Union presented its offer of proof through documents and oral representations by counsel.

² In its brief, the Employer mistakenly contends that three charges (26-CA-19242, 26-CA-20195 and 26-CA-20624) are pending in Region 26. I take administrative notice that each of those cases is closed.

employees and changes in the dock policy. The Employer has posted the required notice and otherwise complied with the Board's order in that case.

In **Overnite Transportation Company**, JD-75-02 (Memphis, TN) Administrative Law Judge Wagman found that seven Memphis employees had been unlawfully terminated during February and April 1999. Among the discharged employees were three dock workers, one city driver, one road driver, one trailer mechanic and one terminal maintenance employee. One of the dock workers, Sam Powell, served as chief job steward on the dock, organized and bargained for the Union at other locations around the country, and regularly confronted management officials about working conditions. Judge Wagman also found that the Employer failed to respond to the Union's request for information.

The other documents offered by the Union establish that employees from the Tupelo terminal make runs to the Memphis terminal and work on the dock there for as much as three hours. The remaining documents include correspondence between the Employer and the Union regarding pending line haul changes at both Memphis and Tupelo centers and detailing the Union's efforts at local bargaining.

The Union contends that Tupelo, located about 85 to 90 miles from Memphis, maintains a "special relationship vis-à-vis Memphis". Thus, the Union asserts that Tupelo drivers are "subject to and victimized by the same coercion imposed on the Memphis drivers by the Employer." The Union asserts that a fair election cannot be conducted among Tupelo employees because of the

Employer's "proven anti-union animus and its numerous unfair labor practices in Memphis."

After having considered the Union's offer of proof and the arguments in its brief, as well as the Petitioner's showing of interest which is based upon recent signatures of Tupelo employees, I conclude that there is insufficient basis for concluding that the Employer's unfair labor practices in Memphis will preclude a free election among employees in Tupelo. With regard to the factors to be considered in an exception to the policy to hold a representation case in abeyance, I note that although the character of the unfair labor practices are serious, the unfair labor practices are remote in time and have been remedied except for those in the July 2002 judge's decision. With the possible exception of the change in dock rules which has now been remedied, it does not appear that any of the Tupelo employees were directly affected by the unfair labor practices at Memphis. The Tupelo employees are in a different bargaining unit and were not a direct target of the unfair labor practices. They are entitled and the recent showing of interest indicates they are interested in expressing their views concerning representation. While the Union's offer of proof shows some degree of interchange among Tupelo drivers and Memphis dock workers, that alone, does not justify depriving Tupelo employees of their right to an immediate election.

Inclusion of the Part-Time Employees in the Unit

The Employer asserts that there are no changed circumstances which warrant a finding that the certified unit, which includes part-time employees, is no

longer appropriate. At the hearing, the Union refused to take a position with respect to their inclusion/exclusion and did not discuss this issue in its brief.

In Case 26-RC-7856, the Union was certified as the exclusive collective-bargaining representative on May 29, 1998 in a unit consisting of all full-time and regular part-time over-the-road truck drivers, city truck drivers, and dock workers employed by the Employer at its Tupelo, Mississippi facility excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

At hearing, the parties stipulated that office clerical employees, professional employees, guards and supervisors should be excluded from the unit. The parties stipulated, and I find, that Service Center Manager Jeff Fox and Supervisor Kris Duncan are supervisory employees within the meaning of Section 2(11) of the Act and are excluded from the unit in that they have sufficient authority to direct the work force and effectuate discipline. With respect to office clerical employees, the parties stipulated, and I find, that Jessica Frank, operations clerk, and Carrie Lyles, billing clerk, perform office clerical functions and are appropriately excluded from the unit. As for the exclusion of professional employees, the parties stipulated, and I find, that Mike Wren is a sales representative and shares no community of interest with employees in the unit.

Service Manager Fox testified that there have been no changes to the bargaining unit classifications since the above unit was certified. He also testified that there have there been no operational changes to the terminal.

Since about September 2002, the Employer has employed two part-time dock workers who work 20 to 25 hours each week - Monday through Friday from

5 p.m. to 9 p.m. or from 6 p.m. to 10 p.m. No part-time employees were employed when the unit was certified in 1998. The part-time employees work along side four full-time dock workers on the outbound dock shift, which normally runs from 5 p.m. to midnight.

The part-time dock workers also interact with city drivers who return to the terminal after 5 p.m. At times the part-time dock workers assist the city drivers in freight handling functions. At other times, city drivers unload freight when they return to the terminal. The road drivers depart between 5 p.m. and 10 p.m.

Both full-time and part-time employees report to Supervisor Kris Duncan. All employees are subject to the same policies and practices and the Employer's handbook applies equally to all employees.

The part-time dock workers earn \$4 or \$5 per hour less than their full-time counter-parts. They do not receive the full range of benefits as full-time employees. For example, contrary to full-time employees, part-time employees only become eligible for medical and dental health insurance after six months of employment. The record does not indicate when coverage for full-time employees begins.

The Union presented no evidence of changed circumstances warranting a finding that the certified unit is no longer appropriate. **Trident Seafoods**, 318 NLRB 738 (1995), enfd. 101 F.3d 111 (D.C. Cir. 1996) (the party challenging an historical unit bears the burden of showing that the unit is no longer appropriate); **Mo's West**, 283 NLRB 130 (1987) (similar burden on party challenging historical unit in decertification petition); **Campbell Soup Co.**, 111 NLRB 234 (1955)

(burden on party challenging historical unit applied to decertification petition). This evidentiary burden is a heavy one. **P. J. Dick Contracting**, 290 NLRB 150, 151 (1988). Moreover, as the above evidence demonstrates, part-time employees interact on a regular and substantial basis with unit employees and share common supervision. Therefore, I find that the unit sought by the Petitioner, which is co-extensive with the certified unit, is appropriate for the purposes of collective bargaining. There are about 22 employees in this unit, including the two part-time employees.

CONCLUSION AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time over-the-road truck drivers, city truck drivers, and dock workers employed by the Employer at its Tupelo, Mississippi facility.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors, as defined in the Act

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters, Local 667. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 1407 Union Avenue, Suite 800, Memphis, TN 38104, on or before December 6, 2002. No extension of time to file this list will be granted except in extraordinary

circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board

in Washington by 5 p.m., EST on December 13, 2002. The request may **not** be filed by facsimile.

Dated at Memphis, Tennessee, this 29th day of November 2002.

/S/

Ronald K. Hooks, Regional Director
Region 26, National Labor Relations
Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627

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